
HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE WRITTEN EXAMINATION

Question paper

Time allowed: 2 hours 30 minutes

YOU MUST NOT OPEN THIS PAPER UNTIL YOU ARE TOLD TO DO SO

Permitted materials

- Hong Kong Civil Procedure (the Hong Kong White Book);
- The Hong Kong Solicitors' Guide to Professional Conduct (Vol. 1) published by the Law Society; and
- The Law Society's Code of Advocacy for Solicitor Advocates

PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY

1. This written examination comprises one part of the assessment for higher rights of audience. There are 50 marks allocated for this examination.
2. Candidates may use their own copies of permitted materials. This is so even though they may contain annotations or highlighting provided this has been done in the ordinary course of use and reference. However, extra materials, for example, notes prepared specifically for this examination are not to be included. In the event of a dispute between the invigilator and a candidate, the decision of the invigilator shall be final.
3. If, in answering any question in this examination, a significant ignorance of the code of ethics governing solicitors and/or solicitor advocates is revealed, the Higher Rights Assessment Board may determine that it should result in a failure of the overall assessment irrespective of the candidate's marks otherwise.
4. Candidates must not remove this question paper from the examination room.

The Case

Your long-standing client, Terry Rui, is the managing director of Golden Earth Trading (Pvt) Limited, a Hong Kong registered company. He holds 80% of the issued shares. His wife, who is director of the company but plays no role whatsoever in the day-to-day administration of the company or in making decisions for it, holds the balance of 20%. The principal business of Golden Earth is buying and selling commodity-based businesses. On 5 March 2016, you receive the following email from him.

Sorry, I can't speak to you directly. I fly out of Hong Kong tonight and this matter has just blown up in my face.

You will recall that in July 2013 I purchased a Western Australian based business run by a husband-and-wife team, Ted and Marlene Griffiths, called Outback Oils. They manufactured a line of spa products, skin lotions, soaps and the like. What made their products so special was that they contained rare oils from the bark of trees that only grow in the Kimberley region of Western Australia. You will remember that the aboriginals call the tree the 'Waga Tree'. Ted and Marlene had secured the sole right to harvest the oil for a 20 year period from the Kimberley Indigenous Advancement Council. The licence was held in their joint names.

You will recall that I bought the business for HK\$30 million, acting as agent for a company to be registered. The deal had to be secured quickly and I wrote the agreement myself. I have been through my papers and the principal clause of that agreement reads –

The buyer, a company to be registered in Western Australia but to be a wholly-owned subsidiary of Golden Earth Trading (Pvt) Limited, hereby purchases for a cash sum of HK\$30 million the complete partnership business known as Outback Oils, the complete business consisting of, first, the full term remaining of the Waga Tree harvesting licence (17 years), second, the recipe for all the products currently manufactured by the business and, third, all stock in trade of Outback Oils.

You will recall, on my instructions, incorporating a private company in Western Australia by the name of Outback Spa (Pty) Limited which is a wholly-owned subsidiary of Golden Earth Trading (Pvt) Limited. Although I never get you to do anything, you are a director of this company. Ted and Marlene's manufacturing business was placed into Outback Spa, this being Outback Spa's sole asset.

You will also recall us talking about the potential value of the exclusive licence to harvest the Waga Tree. To one of the global cosmetics companies, properly promoted, the licence could be worth HK\$100 million or more. That's why, on your advice, I put the harvesting licence into a separate company also incorporated in Western Australia, that company being Outback Harvesting (Pty) Limited. You may not remember, but you are also a director of Outback Harvesting which is a wholly-owned subsidiary of Golden Earth. Outback Harvesting then gave the rights to Outback Spa to harvest in accordance with the harvesting licence, subject to it meeting all fees and charges. The agreement was subject to 3 months notice of termination either way.

After my marketing campaign in South East Asia, the spa business did very well. However, the competition in this field is fierce and in November 2015 I decided to make a profit and sell, my asking price being HK\$45 million. Stupidly, my Australian agent put out a brochure advertising the sale of 'the complete business' for that price. I should have got that changed but I suppose I was just too busy.

I received a number of offers well below the asking price. Then, on 1 February of this year, when I was in Sydney on my own – my wife was playing golf in Hawaii with her friends - I received a telephone call from Dan Brown, the man who headed up my harvesting team in the Kimberley region. You remember Dan, I pretty much inherited him from Ted and Marlene; he had worked for them for a decade or more. He was telephoning from the middle of the bush and so the line was pretty bad. But the terms of our agreement were settled in the emails that followed our conversation.

I sent the first email immediately after our conversation on 1 February. It read –

- a) *This confirms our conversation this morning in which it was agreed that your syndicate incorporated under the name of Brown Snake Acquisitions, a company incorporated in Western Australia, has agreed to purchase all the issued shares in Outback Spa for a sum of HK\$45 million, this sum to be paid within 20 days of completion of due diligence.*
- b) *As agreed, in purchasing the shares, you are purchasing the complete business of Outback Spa including the recipes for the entire product range, all stock in trade, all production equipment and the benefit to be obtained from the current supply agreements to spas and retail outlets throughout Australia and South East Asia.*
- c) *Concerning matters of due diligence and responsibility for the current debts of the company, these are set out in Annexure A, an attachment to this email. As to due diligence, Brown Snake Acquisitions will confirm that it has satisfactorily completed due diligence by 1 March 2016, after which payment of the purchase price is to be paid within 20 days, that is, on or before 20 March 2016.*
- d) *Any dispute arising out of this agreement, if the parties are unable to settle it after mediation, shall be subject to the laws of Hong Kong.*

e) *In the event of any litigation, it does not matter where the fault lies, Brown Snake Acquisitions agrees to meet all expenses and charges of whatsoever nature and howsoever incurred without limitation.*

f) *This constitutes the entire agreement between the parties; no asserted oral terms and conditions shall be binding.*

The following day, 2 February, I received the following reply from Dan Brown –

As to the agreement being subject to the laws of Hong Kong, surely Australia is the obvious jurisdiction for a number of reasons. But let's leave that until – hopefully never – a decision has to be made on which courts have jurisdiction. What really matters to us is that there is no misunderstanding that we are purchasing the complete business A to Z: you remember Ted and Marlene's agreement.

The truth is that at the time I did not remember the exact terms of that agreement. But to protect myself – there being no way that I was prepared to give away the harvesting rights - I sent Dan Brown an email on 3 February which read –

As far as I am concerned, our agreement is clear. In purchasing all the issued shares in Outback Spa, you are purchasing its complete business, A-Z, that is, the business of Outback Spa.

The following day, 4 February, Dan Brown sent the following email to me –

Fine, so long as there is no misunderstanding – the complete business.

I didn't hear further from Dan Brown but I knew that he had contacted our Hong Kong accountants concerning due diligence. The next email was received from him on 1 March. It read –

a) *Happy to confirm that our accountants (who have been through the books) have given us the all clear on due diligence.*

b) *Just to let you know that the premium due to the Kimberley Indigenous Advancement Council for the transfer of the harvesting rights is AU\$25,000. I attach a copy of the licence transfer form. Please sign, scan and email back as soon as possible.*

On 2 March, I replied by email –

The harvesting rights were never part of the agreement. The harvesting rights are held by another company, Outback Harvesting. You were able to carry out due diligence. You confirmed you had done so. If you had checked, you would have seen that the harvesting licence was held by another company.

Yesterday, 4 March, I received a final email from Dan Brown –

You knew from the beginning that the harvesting rights had to be part and parcel of our agreement. I told you so, on the telephone and you said you understood. Whatever the slippery language, you've tried to cheat us. As for due diligence, that's a two-way process. You never told us you had moved the licence to a third party. Unless you agree within 24 hours to transfer the harvesting licence as an integral part of our agreement, we will consider the agreement to be of no force and effect. No payment will be made to you.

The truth is that I need the \$45 million badly. It could be make or break for me. I can't afford to let this go. But I am not going to give him the exclusive harvesting rights. As you know, I am negotiating with VSP, one of the world's biggest cosmetics organisations, to sell them the licence and that could be a fortune.

I want you to institute action in Hong Kong immediately. We have to put on the pressure. Please sign all necessary documents, including the statement of claim, on my behalf and I will verify everything when I get back in six weeks.

Normally I would be worried about the costs of the litigation but in this case the agreement gives me 100% protection, even if I lose. So push ahead. I don't think they have deep pockets.

In respect of this litigation, I want you to be both my solicitor and my solicitor advocate. I know you are pretty rusty at court stuff, but what I need more, even if you don't know your way around, is the ability to confide in somebody with no fear of repercussions from the 'morality police', you know what I mean. Of course, you representing me as a solicitor advocate will have to be on the basis of 'no win, no fee'. That's okay, right?

Terry

P.S. As to whether anything was said about the harvesting rights in my telephone conversation with Dan Brown, as I said, the line was not good. Maybe he did. There's a bell ringing somewhere. That's why I had to be so careful with the wording of my emails to Dan Brown.

The Questions

Question 1 (3 marks)

Terry Rui wants you to “institute action in Hong Kong immediately”. Acting in accordance with his instructions, which company would you cite as the plaintiff?

Question 2 (4 marks)

Because there is mention in the emails that any dispute shall be subject to the laws of Hong Kong, Terry Rui wants you to confirm that you can issue proceedings in Hong Kong free of any later challenge by Brown Snake Acquisitions. What would be your advice to Terry Rui in respect of the following:

- a) Having regard to the terms of the emails, has agreement been reached as to the governing law? (2 marks)
- b) Assuming, for the purposes of this question, that you are satisfied that agreement has been reached as to the governing law, does this of itself give exclusive jurisdiction to the courts of Hong Kong to determine the dispute? (2 marks)

Question 3 (4 marks)

Assuming, for the purposes of this question, that there is no dispute that clause e) in Terry Rui’s email of 1 February 2016 forms part of the agreement. In your opinion – having regard to its terms, and in light of Order 62 of the Rules of the High Court (the White Book) – would it be enforceable? Give reasons.

Question 4 (4 marks)

Because he is out of Hong Kong, Terry Rui wants you to sign on his behalf all necessary documents including the statement of claim on the basis that he will verify everything when he returns to Hong Kong. Does this present you with any difficulties –

- a) in respect of the statement of claim (2 marks); and
- b) bearing in mind that service of the writ and statement of claim must be made outside of Hong Kong? (2 marks)

Question 5
(4 marks)

Is your role as a solicitor advocate in this intended litigation influenced in any way by the fact that, as a solicitor, you are a director of Outback Spa and Outback Harvesting?

Question 6
(6 marks)

- a) Terry Rui knows that you rarely go to court and “don’t know your way around”. On the basis that this is correct, would this fact alone present you with any difficulties in representing him in the role of a solicitor advocate? (2 marks)
- b) Terry Rui wants to employ you as his solicitor advocate on the basis that he needs to confide in somebody with no fear of repercussions from the “morality police”. Does this statement by him present you with any problems in your representation of him? Give reasons. (2 marks)
- c) Terry Rui wants you to agree to representing him on the basis of “no win, no fee”. Does this present you with any problems? (2 marks)

Question 7
(5 marks)

Assume for the purposes of this question that the action by Outback Spa has been defended and has been set down for trial. When you come to take proof of evidence from Terry Rui, he says, the following in that document: “Although Dan Brown was telephoning me from the other side of Australia, and although the line was not the best, I could still hear everything that was said and, if there were static interruptions, I asked Dan Brown to repeat himself. That is why, thinking back, I am certain that Dan Brown made no mention of including the harvesting rights in our agreement. If he had raised that issue, I would have made my position crystal clear on the spot.” When you remind Terry Rui that in his original instructions he said something different, he replies by telling you that those instructions were privileged and that he has now had time to think back over events and remembers matters differently. What, if any, ethical concerns may this raise?

Question 8
(5 marks)

Again, assume for the purposes of this question that the action instituted in Hong Kong has been set down for trial. Terry Rui presents you with evidence that Dan Brown has regularly been on hunting trips in the Kimberley region and on those hunting trips has shot crocodiles without a licence, this being an offence punishable by imprisonment in Australia. He wants you to cross-examine Dan Brown on this matter. What would be your advice to him? Give reasons.

Question 9
(5 marks)

The lawyers representing Brown Snake Acquisitions contact you suggesting that an attempt be made to settle the dispute by way of mediation. Terry Rui is not keen to do so, he considers it a waste of money and no more than a way of delaying the litigation proceedings. What would be your advice to him?

Question 10
(4 marks)

Assume for the purposes of this question that you appear as the solicitor advocate at trial. On the first day, you notice that the judge looks tired and on at least three occasions falls asleep, if only for a minute or two. You speak to the opposing counsel who informs you that the judge is recovering from an illness and is on medication. Your client, Terry Rui, is very unhappy. He believes that the trial is going badly for him. He does not want you to take any action, but rather, if he loses the case, to use it on appeal. What steps, if any, should you take?

Question 11
(6 marks)

Without any prior warning, on the second morning of the trial – the trial having been set down for three days only – you are given a witness statement by counsel for the defence. The witness statement is made by Ted Griffiths. In the statement, Ted Griffiths refers to the written agreement in terms of which he and his wife sold the business called Outback Oils to Terry Rui in July 2013 and seeks to place that agreement into evidence. Your client, Terry Rui, is furious. He asks you: what's the relevance? Would you, as Terry Rui's solicitor advocate (representing the plaintiff), have any grounds to object to Ted Griffiths being called? If so, how likely is it that you will be successful in your objection? Give reasons.

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